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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 780

THE BALTIMORE LUGGAGE COMPANY, A MARYLAND CORPORATION, AND GERTRUDE HOLTZMAN AND SAMUEL J. HOLTZMAN, INDIVIDUALLY AND AS OFFICERS OF THE BALTIMORE LUGGAGE COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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THE BALTIMORE LUGGAGE COMPANY, A MARYLAND CORPORATION, AND GERTRUDE HOLTZMAN AND SAMUEL J. HOLTZMAN, INDIVIDUALLY AND AS OFFICERS OF THE BALTIMORE LUGGAGE COMPANY,
Petitioners.

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Baltimore Luggage Company, a Maryland Corporation, and Gertrude Holtzman and Samuel J. Holtzman, individually and as officers of the Baltimore Luggage Company, Petitioners, pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Fourth Circuit (App. C, infra, p. 30) entered in the above-entitled case on the seventh day of November, 1961.

CITATIONS TO OPINIONS BELOW

The opinion of the Federal Trade Commission is printed as Appendix A, infra, p. 19. The opinion of the United States Court of Appeals, for the Fourth Circuit is reported in 296 F. 2d 608, infra, p. 22.

JURISDICTION

The decree of the United States Court of Appeals for the Fourth Circuit was entered on the 7th day of November, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and 15 U.S.C. 45(C).

QUESTIONS PRESENTED

I. Are a manufacturer's pre-ticketed prices fictitious and therefore violative of the Federal Trade Commission Act when only 387 of manufacturer's retail outlets, located in 12 states, sell his product at a retail price of approximately $2.00 lower than the pre-ticketed price in view of the fact that the manufacturer maintains a total of 1,276 retail outlets located throughout the country?

II. Is a manufacturer engaged in the practice of fictitious pricing and therefore in violation of the Federal Trade Commission Act when he places a pre-ticket on his product indicating thereon a suggested retail price and a small number of his retailers regularly sell the product at $2.00 less than the pre-ticketed price?

III. Is a cease and desist order which prevents a manufacturer from furnishing its retailers, who are located throughout the country, a suggested manufacturer's list or retail price, in trade areas where the retailers usually and

regularly sell the manufacturer's product at less than the suggested price, so harsh and burdensome as to render compliance therewith impossible?

STATUTE INVOLVED

The Statute involved in this case is popularly known as the Federal Trade Commission Act, the applicable portions of which are as follows:

> "Sec. 5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 66 Stat. 632 (1952), 45 U.S.C. 45(a)(1).
>
> "Sec. 5(a)(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except bank, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 66 Stat. 632 (1952), 15 U.S.C. 45(a)(6).

STATEMENT OF THE CASE

On December 8, 1959, the Federal Trade Commission issued a Complaint against the Petitioners alleging, *inter alia*, that they are engaged in the practice of using fictitious prices respecting the advertising and sale of their "Lady Baltimore" brand luggage, in violation of the Federal Trade Commission Act. The Complaint charges that the Petitioners attached price tags or tickets to its luggage, thereby representing, directly or by implication, that such prices are the usual and regular prices for which said luggage

sold at retail, whereas, in a number of areas where the representations are made, the pre-ticketed prices are in excess of the true, usual and regular retail price.

On September 28, 1960, the Honorable John P. Poindexter, Hearing Examiner, filed his initial decision, wherein it was held that the allegations of the Complaint were sustained and, consequently, ordered the Petitioners to cease and desist from:

> "... Representing, directly or by implication, by means of pre-ticketing or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made."

The Petitioners entered an appeal to the Commission, which, on March 15, 1961, was denied and it was ordered that the initial decision of the hearing examiner be adopted as the decision and final order of the Commission. The United States Court of Appeals, on November 7, 1961, affirmed the Order of the Commission.

The following facts were presented to the hearing examiner:

The Baltimore Luggage Company, hereinafter referred to as Baltimore Luggage, a Maryland Corporation, and Gertrude Holtzman and Samuel Holtzman, two of its officers, are engaged in the manufacture of luggage in Baltimore, Maryland.

Baltimore Luggage, using a mass production method, manufactures various sizes of luggage in eight different colors. In addition to a number of other brands, it sells luggage under the "Lady Baltimore" trade name.

During the manufacturing process, a perforated ticket is attached to each piece of the "Lady Baltimore" brand luggage. These tickets set forth the size and color of the particular piece of luggage and a dollars and cents figure opposite the word "price". On the back of the tickets, Baltimore Luggage has listed the different sizes of the luggage it manufactures, and opposite therefrom is a price list (R.i. pp. 11, 45-47).

Following inspection, the luggage is boxed and stored in a warehouse which generally contains an inventory of approximately Seventy-Two Thousand (72,000) pieces. Orders are filled and the inventory circulates on a first-in first-out basis (R.i. p. 18). The cost of the luggage to its retail customers does not vary regardless of the quantity purchased, and all the shipments are F.O.B. Baltimore (R.i. pp. 12, 13).

The pre-ticketed luggage is shipped from Baltimore to approximately One Thousand Two Hundred Seventy-Six (1,276) retail customers in cities located in forty-six states and the District of Columbia, of which only three hundred eighty-seven, in approximately twelve states, sell the luggage at less than the pre-ticketed price (R.i. pp. 49, 50). Additionally, these three hundred eighty-seven retail dealers represent 37.5% of Baltimore Luggage's total dollar volume sales. In other words, close to 70% of its retail customers, representing 62.5% of its total dollar volume sales, sell the "Lady Baltimore" brand luggage at the pre-ticketed price (R.i. p. 19).

Upon the aforegoing evidence, together with the testimony of John W. Greene, an attorney-examiner employed by the Federal Trade Commission, who stated that he had visited retail department stores in Philadelphia, Pennsylvania, and four stores in Washington, D.C., and found the

Baltimore Luggage pre-ticket attached to some of the pieces of luggage, while the store was selling the luggage for Two Dollars ($2.000) less (R.i, pp. 12-31, 51-56), the Hearing Examiner concluded that Baltimore Luggage was engaged in the unfair act of fictitious pricing. As a result thereof, a cease and desist order was entered.

ARGUMENT

I.

The Federal Trade Commission Act is not violated when approximately 30% of the manufacturer's customers sell the manufacturer's product at less than the pre-ticketed price.

Although it has been held that manufacturers who pre-ticket their products fictitiously are guilty of engaging in an unfair trade practice in violation of the provisions of the Federal Trade Commission Act, 15 U.S.C.A. 41, et seq.,* it is well established that pre-ticketing per se is not deceptive.

In order to sustain its allegation that the Petitioners, by the use of pre-tickets, misrepresent the usual and regular retail price of its luggage, the Respondent must prove, by substantial evidence, that the usual and regular price at which Petitioners' product is sold at retail, *throughout the country*, is substantially less than its pre-ticketed price. It is not enough that the evidence show a few deviations from the pre-ticketed prices in certain arbitrarily defined local trading areas, but, on the contrary, it must be established that the pre-ticketed prices have not been charged with substantial frequency by Petitioners' retail customers, who comprise its *national retail market*.

* *Clinton Watch Co. v. F. T. C.*, 291 F. 2d 838; cert. den., 368 U.S. 952; *F. T. C. v. Winstead Hosiery Co.*, 258 U.S. 483 (1922).

The evidence in the instant case is clear that Petitioners' production and merchandising methods are designed toward establishing and maintaining a national retail market.

Joseph Rivkin, director of sales for Petitioners, the Baltimore Luggage Company, testified that each piece of Petitioners' Lady Baltimore brand luggage is pre-ticketed as the case proceeds through the production line (R.i., 11-12). The luggage is then inspected, boxed and stored in Petitioners' warehouse. Each order, when received, is filled from an inventory in excess of seventy-two thousand (72,000) pieces of luggage and is shipped on a first-in first-out basis. During the manufacturing and storing processes, Appellant has no knowledge as to where any particular piece will be shipped (R.i., 18).

Mr. Rivkin further testified that the cost to Petitioners' retail customers was without variance throughout the country, regardless of the quantity purchased and that all shipments were F.O.B. Baltimore (R.i., 19, 20). He noted that (R.i., 20):

> "... we have in our system of manufacture an unusual setup in the luggage industry. We work on a very low volume, mass production basis, and it is our contention that we can make X units a year, and by selling all or nearly all of the units that we make, work on very low mark-up, a very small, one or two per cent mark-up, we can give a good product, a good value and the price is constant. In other words, the man who buys twelve pieces of luggage in Milledgeville, Georgia, pays the same thing as Macy's, who order in carload lots."

In short, an analysis of Petitioners' production methods clearly reveals a design towards merchandising on a national, rather than local, scale.

Additionally, since the Respondent in an attempt to sustain the allegations of its complaint, divided Petitioners' national retail market into arbitrarily defined trading areas, Petitioners produced two comparatives, both of which, it is submitted, conclusively prove that Petitioners are not engaged in the unfair practice of fictitious pricing.

(1) A map of the United States (R.i., 49, 50), was introduced into evidence which revealed that although the Petitioners maintain 1,276 retail outlets located in forty-six states and the District of Columbia, only 387, or approximately 30% of these outlets, located in twelve states, sell at less than the pre-ticketed price.

(2) The evidence is uncontradicted that as little as 37.5% of Petitioners' total dollar volume sales were made to retailers who charge less than the pre-ticketed price (R.i., 19).

Thus, it is clear from the record that the Respondent has completely ignored Petitioners' production and merchandising practices in finding, as a fact, that Petitioners are engaged in the practice of fictitious pricing. We respectfully submit that when a manufacturer maintains a nationwide retail market for his product, the usual and regular retail price thereof must necessarily be determined by surveying his entire retail market rather than resorting to specific local trading areas.

II.

A manufacturer's legitimate purpose in furnishing retailers with a suggested retail selling price has been sanctioned by Congress.

The Complaint submitted by the Federal Trade Commission against the Petitioners, The Baltimore Luggage Company, et al., operates from an assumed and fallacious

premise which was, and remains, unfounded in fact; i.e., that the

> "Respondents (The Baltimore Luggage Company, et al.), for the purpose of inducing the purchase of their product, have engaged in the practice of using fictitious prices in connection therewith by attaching, or causing to be attached, tickets to their luggage upon which a certain amount is printed, thereby representing, directly or by implication, that said amount is the usual and regular retail price of said luggage in the areas where the representation is made" (R.i., 2).

The Commission attributes to the Petitioners, an illicit motive by reason, alone, of their uniform tagging procedure, which is necessitated by the exigencies of a volume manufacturing operation engaged in a nationwide sales effort. *Certainly the evidence presented by the Respondent does not sustain the thesis of the Complaint and the finding by the Commission ignores the legitimate intent of "preticketing by a manufacturer of his product.*

It is incumbent upon the Commission to support its findings by substantial evidence. The unique position and resulting responsibility of the Commission has been cogently stated in the recent case of *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337 (7th Cir. 1960), where the court said at page 341:

> "The Commission wears all of the hats involved in proceedings instituted under its authority. It is, at once, the accuser, the prosecutor, the judge and the jury. . . . Under those circumstances we feel that the Commission should assume a wider responsibility than that necessarily undertaken by a private litigant and substantiate its injunctive orders upon the concrete basis of a thorough investigation and full presentation of evidence whenever the existence of unfair or deceptive practices is charged against any respondent."

The procedure of pre-ticketing merchandise with the manufacturer's suggested retail selling price is consistent with the legitimate desire of a manufacturer to establish and maintain the *integrity of his product*. While the Maryland Fair Trade Act, *Maryland Code of Public General Laws*, 1957 Edition, Article 83, Sections 102-110, is not expressly applicable to the issue presented, it is significant to note that the Legislature recognized a manufacturer's interest in protecting the economic value of his product.

> "The primary aim of the Maryland Fair Trade Act is to protect the property — namely, the good will — of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end itself."

Youngs Rubber Corp. v. Dart Drug Corp. of Maryland, 175 F. Supp. 832, 835 (D. Md. 1959).

In the instant case, it remains uncontroverted that the Petitioners' pre-ticketing procedure was done in good faith and that it has a rational connection with maintaining the integrity of their product. The Petitioners' good faith is evidenced by the considerable expense it incurred in providing for perforated tickets so that their retail outlets can remove the price portion of the tag if it was not in accord with the actual selling price (R.i., 45-47).

The importance of suggested retail prices by manufacturers has gained explicit Congressional recognition. The *Automobile Information Disclosure Act*, Public Law 85-506, July 7, 1958, 72 Stat. 325, 15 U.S.C. 1231 et seq., requires the manufacturer of new automobiles to affix a label to the windshield containing the total manufacturer's suggested price. The purpose of this bill is set forth in Report No. 1958, House of Representatives, 85th Congress, 2d Sess.,

Committee on Interstate and Foreign Commerce, as follows (at p. 1):

> "The primary purpose of the bill is to disclose the manufacturer's suggested retail price of the new automobile (passenger car or station wagon) so that the buyer will know what it is. This information is not available now.
>
> "The present-day buyer of a new automobile is usually completely bewildered and unable to find his way through the marketing jungle in which the automobile dealers have become involved.
>
> "This bill will restore the confidence of the automobile buyer. The disclosure of the manufacturer's suggested retail delivered price will help to minimize the advertising extra-vagancies indulged in by some automobile dealers."

Certainly, in passing this bill, Congress did not expect the automobile manufacturer to enforce uniform compliance with the suggested retail prices. Indeed, discount sales of automobiles are commonplace. If it is here held that any sales below pre-ticketed prices render those prices fictitious, the automobile manufacturer will be between the devil of the Automobile Information Disclosure Act and the deep blue sea of the Federal Trade Commission Act.

The determination of the suggested retail selling price is not an arbitrary decision; rather, it is the result of the prevailing market. It must be completely sound and commercially acceptable, and when made in good faith, as was the determination by the Petitioners, it should not be subject to characterization as fictitious pricing.

Establishment of a suggested retail selling price, by means of pre-ticketed merchandise, results in benefits to both the manufacturer and the consumer. The manufacturer obtains the desired integrity for his product and the

consumer is given a standard of value. The latter was recognized by the Department of Commerce in a letter to the Chairman, Committee on Interstate and Foreign Commerce which supported the passage of the *Automobile Information Disclosure Act, supra*, by declaring:

> "In particular the bill should operate not only to expose and thereby to eliminate the much discussed practice of price packing, but *should also afford to buyers a better basis on which to judge the values offered them.*" (Emphasis supplied.)

Report No. 1958, House of Representatives, 85th Congress, 2d sess., Committee on Interstate and Foreign Commerce.

III. The Cease and Desist Order entered herein prohibits established lawful trade practices.

As the order now stands, pre-ticketing is not per se violative of the order, it is only such when the pre-ticketed price is in "excess of the price at which such product is usually and customarily sold at retail in the trade area or areas where the representations are made". Does this mean that the Petitioner is obligated to maintain a constant surveillance on the pricing activities of over 1,200 retail outlets across the nation, both before and after shipment of its products? If it does, the Order has the effect of making all pre-ticketing infeasible and does not merely place limitations on a lawful practice. It was not the intention of the Federal Trade Commission Act to adversely affect lawful trade practices. *F. T. C. v. Royal Milling Co.*, 288 U.S. 212 (1933); *Ford Motor Co. v. F. T. C.* (C.C.A. 6th Cir., 1941) 120 F. 2d 75; cert. den., 314 U.S. 668.

There exists, at the present time, an obvious conflict among the decisions of the Federal Trade Commission hearing examiners respecting the issue of manufacturers' list prices.

In the instant case, Mr. Poindexter, the hearing examiner, ordered that the petitioners are prohibited from

"1. Representing, directly or by implication, by means of pre-ticketing or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made.

2. Furnishing to others any means or instrumentality by or through which the public may be misled as to the usual and customary prices of respondents' merchandise.

3. Putting any plan into operation through the use of which retailers or others may misrepresent the usual and regular retail price of merchandise." R. 48.

In direct conflict with the above order is that found in *In the matter of The Regina Corporation, et al.*, F. T. C. Docket No. 8323.

The Regina Corporation is a large manufacturer of electrical household appliances. It supplies its retailers and distributors with manufacturer's list prices or suggested list prices. The retailers, including department stores, by means of advertisements, would show two prices, one, "the manufacturer's list price" and immediately below, a lower price, which is the offering price. The Commission contended that such advertising shows that Regina's list prices are not the usual and regular retail prices in those areas where the advertisements appear and that by engaging in the practice of furnishing such list prices to its distributors and retailers, the manufacturer is violating the Federal Trade Commission Act by placing in the hands of its retailers the means to defraud the public. Accordingly, the Commission sought an Order

containing the exact language as the Order entered in the instant case.

Mr. Herman Tocker, the hearing examiner, in disagreeing with Commission counsel, reasoned at p. 8 of his initial decision as follows:

"I do not doubt that suggested list prices have some of the attributes of value assigned to them by respondents, that their abandonment could cause confusion among consumers and promote the manufacture of potentially dangerous electrical appliances put out solely to meet price situations. All this could be to the disadvantage of the honest, legitimate manufacturer and contribute to deception of the consumer.

We do not cure a bad condition by creating another, possibly worse condition. As noted before, Commission counsel says he does not contend that the establishment of list prices and the furnishing thereof to retailers are illegal. He contends, however, that remedial action must be taken against Regina, because, as I have related above, Regina furnished these list prices to retailers when it knew that they were not the usual, customary prices for the commodities in the areas involved and thereby provided the means whereby some of those retailers received the public as to what such prices actually were. He proposes an order which would bar Regina from 'Representing, through the use of list prices, that any amount is the usual and customary retail price of merchandise, when such amount is in excess of the price at which said merchandise is usually and customarily sold in the trade area or areas where the representation is made.'

This is an impossible and undeserved burden to place upon Regina.

One Hundred Eighty-Nine Standard Metropolitan Statistical Areas for which so many different types of retail outlets must be studied, must necessarily present an insurmountable problem to a manufacturer who might be required to compute his suggested retail sell-

ing prices according to the usual and customary prices at which they might be sold in any given area. The problem becomes more complicated by a reference to a map prepared by the Bureau of the Census showing the Standard Metropolitan Statistical Areas in the United States from which it appears that in several of the states there is no Standard Metropolitan Statistical Area.

This difficulty cannot be ignored and it is my opinion that the order thus requested would prevent and prohibit Regina from using any suggested list price except within the limitations of *Colgate*, 250 U.S. 300, or by resorting to fair trade contracts where legal.

If this happened, the wrongful practice condemned by the Commission, the practice which works the deception, would not be prevented thereby. Any retailer could still engage in the self-same practice merely by changing his tune. Instead of advertising 'Manufacturer's Suggested List Price,' he would advertise 'Manufacturer's Fair Trade Price in _____' or 'Manufacturer's Established Price in _____.'

An order which is both impossible to obey and subject to evasion by the persons primarily responsible for deception should not be entered by an administrative agency. This does not mean that the agency is thereby rendered powerless to act. I am of the opinion that appropriate remedial action can be taken which will be effective to lay the groundwork for detecting and halting deceptive practices of retailers. This can be accomplished by making it clear, and a matter of contract or voluntarily assumed obligation, that the manufacturer's suggested list price may not be used for deceptive comparative pricing. This is the objective which I seek by the order to be set forth below.

In accordance with his reasoning, the hearing examiner passed an order which, at page 14 of his initial decision, provided, *inter alia*, that the Respondent cease and desist from:

"1. Furnishing or supplying to any person any literature, list, schedule or material mentioning or describing any such products which contains, sets forth or states any price or statement of value purporting to be a 'manufacturer's list price,' 'suggested list price,' 'suggested retail price,' or words of similar meaning unless, in connection with the furnishing or supplying thereof and clearly stated thereon, the reservation is made that the same is furnished or supplied only for the information of any recipient thereof for the purpose of identification, that nothing therein contained shall be regarded or used as an indication that it is the usual and customary retail price of the product or products to which it refers and that it is received by the recipient and by any person who may receive it from the recipient upon the express condition and understanding that nothing therein contained shall at any time be used in any manner for the purpose of representing, or in a manner tending to represent, that any such price or statement is the usual and customary retail price of any product, when it (that is, any amount mentioned in the literature, list, schedule or material) is in excess of the price at which the same is usually and customarily sold in the trade area or areas where the representation is made."

Petitioners respectfully submit that the order entered in the Regina case accomplishes the Commission's objectives by preventing deceptive pricing practices and also permits a manufacturer to continue to carry on the lawful practice of supplying its retailers and distributors with suggested manufacturer's price, whether it be by price lists, pre-tickets or other means. On the other hand, the order entered in the instant case invalidly prohibits the Petitioners from engaging in the conceded lawful trade practice of furnishing their retailers with a manufacturer's guide to retail pricing.

CONCLUSION

The importance of the questions involved and the conflict and uncertainty in the Federal Trade Commission present a compelling case for review to resolve the conflicts, as well as to reverse the incorrect decision below.

Respectfully submitted.

ALBERT L. SKLAR,
ROBERT L. SULLIVAN, JR.,
WILLIAM J. PITTLER,
SKLAR & SULLIVAN,
Counsel for Petitioners.

APPENDIX A

OPINION OF THE COMMISSION

(Filed March 15, 1961)

By Secrest, Commissioner:

The complaint in this matter charges respondents with violation of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents to cease and desist from the practices found to be unlawful. Respondents have appealed from this decision.

Respondents are engaged in the manufacture of luggage which they sell to retail dealers located throughout the United States. This luggage, sold under the trade name "Lady Baltimore", is made in eight sizes and in eight colors. Each piece of luggage, when shipped by respondents has attached to it a tag or ticket which sets forth the size and color of the article and an amount in dollars and cents opposite the word "Price". On the back of the ticket the various sizes of luggage manufactured by respondents are listed and opposite the name or designation of each size in an amount which purports to be the price of that particular size. The hearing examiner found and respondents conceded that the luggage in question is usually and regularly sold at retail in the New York, Philadelphia and Washington trade areas for approximately $2.00 less per article than the amount printed on the ticket attached to the article. The hearing examiner further found that items of respondents' luggage bearing these tickets were displayed for sale to the public by retailers in the aforementioned trade areas. He held, therefore, that respondents had falsely represented that the amounts shown on the tickets were the usual and regular retail prices of their luggage in those trade areas and further that respondents had placed in the hands of retailers the means and instrumentality by which the public could be misled as to the usual and regular prices of respondents' merchandise.

We will consider first respondents' argument that the evidence does not support the hearing examiner's finding

that pieces of their luggage had the price tickets attached to them when displayed by retailers. This finding is based on the testimony of the Commission's investigator who stated that he had seen the tickets on luggage displayed in retail stores in Philadelphia and Washington. Respondents claim that this testimony is rebutted by the testimony of luggage buyers for two of the stores visited by the investigator. One of the buyers testified that at the time of the investigator's visit respondents' tickets were displayed on only three or four pieces of luggage and had been removed from the remainder. The other buyer testified, in effect, that respondents' luggage would sometimes "get on the floor without the ticket being torn off." We think this testimony tends to corroborate rather than contradict that of the investigator. Respondents' further statement that they had advised retailers to remove the portion of the ticket showing the "price" of the article cannot overcome the direct evidence that retailers had failed to do so. Respondents' argument on this point is, therefore, rejected.

Respondents next object to the hearing examiner's finding that the "prices" preticketed on their luggage were not the usual and regular prices of such luggage in certain trade areas. They contend that their entire national retail market, rather than specific trade areas, is the proper basis for determining the usual and regular prices of their luggage. They also point out in this connection that approximately 70% of their retail customers, located in 34 states and representing about 62.5% of respondents' total dollar volume of sales, sell the luggage at the preticketed prices. In making this argument, respondents cite as authority for their position the Commission's decisions in the matters of *The Orloff Company, Inc.*, Docket No. 6184; *Neuville, Inc.*, Docket No. 6405; *Ma-Ro Hosiery Company, Inc.*, Docket No. 6436; and *Sam S. Goldstein*, Docket No. 7414.

We held in the cases cited by respondents that the preticketing of merchandise with an amount in excess of the price at which such merchandise is usually and regularly sold at retail is an unfair trade practice. The issue of whether the usual and regular retail price should be determined on the basis of a national retail market as opposed to

a local retail market was not raised, however. Moreover, we did not hold in those cases, nor have we held in any decision, that it is necessary to consider all retail sales of a product on a nationwide basis in determining whether a certain amount is the usual and regular retail price of that product. Nor have we held that a showing that a preticketed price is the usual and regular price of a product in some sections of the country is sufficient to establish that that price is the usual and regular price of the product throughout the country, including those sections in which it is not the usual and regular price.

Members of the purchasing public in the aforementioned trade areas may well believe that the preticketed product is being sold at a reduced price by the store in which the article is offered for sale and that the higher amount marked on the ticket is the prevailing price for the product elsewhere in the same trade area, not necessarily in some other trade area. Although such a person may be interested in knowing the usual and regular price of merchandise in other sections of the country, he is particularly interested in knowing whether he is getting a bargain in the trade area in which he is making his purchase. It is our opinion that respondents' price tickets have the capacity and tendency to mislead him in that respect.

Respondents finally contend that there is no evidence to support the hearing examiner's conclusion that their preticketing practices have the capacity to mislead members of the purchasing public into the purchase of substantial quantities of their luggage. This argument must also be rejected. Since it has been repeatedly held that a claim that a product is being offered for sale at a reduced price is an important factor in affecting the sale of that product, we believe that the hearing examiner's conclusion is amply supported by the showing that respondents have misrepresented the usual and regular prices of their products in certain trade areas. Evidence that members of the purchasing public have actually purchased respondents' product as a result of the preticketing practices is not required.

Respondent's appeal is denied, and the initial decision will be adopted as the decision of the Commission.

APPENDIX B

OPINION

(Filed November 7, 1961)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8382

THE BALTIMORE LUGGAGE COMPANY, a Maryland Corporation, and GERTRUDE HOLTZMAN and SAMUEL J. HOLTZMAN, individually and as officers of The Baltimore Luggage Company,

Petitioners,

versus

FEDERAL TRADE COMMISSION,

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

(Argued October 16, 1961. Decided November 7, 1961)

Before SOPER and BRYAN, Circuit Judges, and BARKSDALE, District Judge.

William J. Pittler (Robert L. Sullivan, Jr., and Sklar & Sullivan on brief) for Petitioners, and Gerald Harwood, Attorney, Federal Trade Commission, (James McI. Henderson, General Counsel, and J. B. Truly, Assistant General Counsel, Federal Trade Commission, on brief) for Respondent.

BARKSDALE, District Judge:

After an administrative hearing, the Federal Trade Commission issued an order against the Baltimore Luggage Company, a Maryland Corporation, and Gertrude Holtz-

man and Samuel J. Holtzman, its controlling officers (hereinafter collectively referred to as "Baltimore"), requiring Baltimore to cease and desist from a continuation of certain of its acts and practices alleged to be violative of the Federal Trade Commission Act. Feeling aggrieved by this order, Baltimore has filed its petition for review in this court.

The pertinent provisions of the Act are as follows:

"Sec. 5(a)(1). Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 66 Stat. 632 (1952), 15 U.S.C. 45(a)(1).

"Sec. 5(a)(6). The Commission is hereby empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 66 Stat. 632 (1952), 15 U.S.C. 45(a)(6).

"Sec. 5(c) . . . the findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 52 Stat. 113 (1938), 15 U.S.C. 45(c).

There is little, if any, controversy as to the facts. Baltimore Luggage Company manufactures luggage in the city of Baltimore, which it sells under the trade name of "Lady Baltimore", in eight different sizes and eight different colors, directly to retail dealers throughout the United States. The individual defendants are its officers, who formulate, direct and control its acts and practices. Each piece of luggage is shipped by Baltimore to the retail dealer with a printed ticket or tag attached, setting forth a retail price for that piece of luggage. The precise language appearing on a typical ticket or tag is as follows:

"Lady Baltimore
Fashion Luggage
Size: 18". O'Nite
Color: Coppertone
Price 12.95 —
* Subject to existing Federal & Sales Taxes"

During the period involved in this proceeding, the ticketed retail prices ranged from $12.50 plus tax for the smallest pieces to $21.95 plus tax for the largest pieces. Actually, during this period Baltimore's luggage was usually and regularly sold by numerous retailers, including those in the New York, Philadelphia, Washington and Baltimore trade areas, at a retail price of approximately $2.00 lower than the ticketed price. The regular and customary retail price for Baltimore's luggage was approximately $2.00 lower than the ticketed price in areas throughout the country in which were located 387 of the approximately 1,276 retail outlets for Baltimore's luggage, which retail outlets accounted for approximately 37½% of Baltimore's sales. Although Baltimore's pretickets were sometimes removed by the retailers who sold the luggage at less than the preticketed price when the luggage was put on sale, generally the retailers left Baltimore's tickets on the luggage. Some stores also exhibited cards furnished by Baltimore showing the same price as that printed on Baltimore's tickets. The hearing examiner found, and the Commissioner adopted his findings, that by preticketing its luggage, and in some instances also by furnishing customers with display cards showing retail prices, Baltimore represented that the prices on the tickets and cards were the usual and regular retail prices for its luggage, and that this representation was false in those trade areas where the luggage was usually and regularly sold at retail at approximately $2.00 less. The Commission, adopting the finding of its hearing examiner, further found that, in the areas in which Baltimore's luggage was usually and regularly sold for approximately $2.00 less than the preticketed price, Baltimore had placed in the hands of the retailers the means of deceiving purchasers into believing that the luggage was being offered at reduced prices lower than the regular retail prices. Although Baltimore contended that any representations as to the regular and usual price of its luggage should be judged on the basis of the price at which the luggage is sold throughout the country, rather than the price at which it is regularly and customarily sold in the trade areas where the preticketed price was higher than the actual price, the Com-

mission rejected this contention and issued its order directing petitioners to cease and desist from:

"1. Representing, directly or by implication, by means of pre-ticketing or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made.

"2. Furnishing to others any means or instrumentality by or through which the public may be misled as to the usual and customary prices of respondents' merchandise.

"3. Putting any plan into operation through the use of which retailers or others may misrepresent the usual and regular retail price of merchandise."

Although Baltimore contends that this order is ambiguous and indefinite, we find no substance in this contention.

The Commission does not contend that for the manufacturer to place tickets on its products before delivering them to retailers indicating the retail purchase price, a practice known as "preticketing", is illegal or deceptive *per se*. But the Commission does maintain, and Baltimore agrees, that manufacturers who preticket their products fictitiously are guilty of engaging in an unfair trade practice in violation of the Act. It was held in *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, that the Commission might properly inhibit a manufacturer from placing labels on its merchandise fictitiously misrepresenting the material from which the merchandise was manufactured. And more to the point, it has recently been held in *Clinton Watch Co. v. Federal Trade Commission*, 291 F. (2) 838, that preticketing merchandise at fictitious and excessive prices, was an activity proscribed by the Act in order to protect the interest of the public. The court said (p. 840):

"Petitioners are engaged in the manufacture of watches which are sold in interstate commerce to

wholesale, mail order houses, to discount houses, and to retailers. A price tag is attached to each watch at the factory, reflecting a price substantially in excess of the normal and usual retail price. Ultimate purchasers of petitioners' products testified that they bought the watches at substantially lower prices than those indicated on the attached tickets. Preticketing at fictitious and excessive prices must be deemed to have the tendency of deceiving the public as to the savings afforded by the purchase of a product thus tagged as well as to the value of the product acquired. Petitioners' practice places a means of misleading the public into the hands of those who ultimately deal with the consumer. Notwithstanding the prevalence of these practices and the familiarity therewith among the members of the trade, these activities are proscribed to protect the interest of the public. Federal Trade Commission v. Winstead Hosiery Co., 1922, 258 U.S. 483, 494, 42 St. Ct. 384, 66 L. Ed. 729.

"Misrepresentation as to the retail value of merchandise by means of an attached, fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon constitute unfair methods of competition. Miresk Industries, Inc. v. Federal Trade Commission, 7 Cir., 1960, 278 F. 2d 337, 340, certiorari denied 364 U.S. 883, 81 S. Ct. 173, 5 L. Ed. 2d 104; Harsam Distributors, Inc. v. Federal Trade Commission, 2 Cir., 1959, 263 F. 2d 396, 397."

Baltimore's principal contention is that: "In order to sustain its allegation that the Petitioners (Baltimore), by the use of pretickets, misrepresent the usual and regular retail price of its luggage, the Respondent (the Commission) must prove, by substantial evidence, that the usual and regular price at which Petitioners' product is sold at retail, *throughout the country*, is substantially less than its preticketed price." With this contention we do not agree. The evidence showed that Baltimore sold its luggage to 1,276 retail customers in cities located in 46 states and the

District of Columbia. Of this number, 387 retailers in approximately twelve states sold this luggage at retail at substantially less than the preticketed prices. Sales to these 387 retail dealers represented 37.5 of Baltimore's total dollar volume sales. As to the preticketing in the 387 retail stores in which the retail prices charged were substantially less than the preticketed retail prices, the Commission has found as a fact that "Respondent's purpose is self evident to make it appear to the store customers that the store was selling the luggage at approximately two dollars less than the regular retail price, and the customer would believe he or she was getting a reduced price. It is apparent that the respondent corporation was aware that its price tags were being used for deceptive purposes."

No authorities have been cited to us, nor do we find any deceptive practice on the part of a manufacturer which is widespread, it must be shown that the practice is not only widespread but universal.

The Commission has supplied us with copies of agreed orders entered in the proceedings *In re Siegmund Werner, Inc., etc.*, Oct. 28, 1960, and *In re Knight of Rest Products, Inc., etc.*, Sep. 13, 1960. Both of these orders required defendants to cease and desist from, *inter alia*, preticketing their merchandise with a retail price "in excess of the price at which such product is usually and customarily sold at retail *in the trade area or areas where the representation is made*." (Italics supplied.)

It does not appear from these orders how widespread the deceptive preticketing had been, but the italicised language would seem to indicate that the deceptive preticketing was not universal, but only in certain areas.

We hold that the evidence here was ample to support the finding of the Commission that Baltimore's preticketing practice was deceptive to the extent indicated above, and fully justified the Commission's order requiring Baltimore to cease and desist from this practice. It is to be noted that the Commission's order does not proscribe Baltimore's practice of preticketing, the order only requires Baltimore to cease and desist from preticketing its merchandise with

a retail price "when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made."

Baltimore seeks to justify its preticketing practice by reference to the Automobile Information Disclosure Act. Public Law 85-506, July 7, 1958, 72 Stat. 325, 15 USCA 1231-1233, which requires manufacturers of automobiles to place a label upon each new car delivered to a retailer showing "the retail price of such automobile suggested by the manufacturer", together with the suggested retail price of accessories and other items of optional equipment attached to the automobile, and the transportation costs. While this Act does require a species of preticketing, it is not a statute of general application, but applies solely and specifically to the sale of new automobiles, and was intended to protect the public from fraudulent practices engaged in primarily by retail automobile dealers. The legislative history of this Act, U.S. Congressional and Administrative News, 85th Congress 1958, p. 2902, in speaking of the purpose of the bill and the need for the legislation, sets out (pp. 2903, 2904, 2905):

"The primary purpose of the bill is to disclose the manufacturers' suggested retail price of the new automobile (passenger car or station wagon) so that the buyer will know what it is. This information is not available now.

"The present-day buyer of a new automobile is usually completely bewildered and unable to find his way through the marketing jungle in which the automobile dealers have become involved.

"This bill will restore the confidence of the automobile buyer. The disclosure of the manufacturer's suggested retail price will help to minimize the advertising extravagances indulged in by some automobile dealers.

"NEED FOR LEGISLATION

"Recently, the new car dealers have been plagued by unfair and unscrupulous marketing practices on the

part of some dealers, which have been injurious to the new car dealers as a whole, injurious to the car manufacturers, and bewildering to the purchasers of new cars. These practices are what is called price packing and misleading advertising. They have created chaos and confusion in the market place.

"Price packing is the practice of marking up or adding charges over and above the normal recognized markup from the wholesale price at which a dealer purchases a new automobile from a manufacturer. The pack in the price of the car is, of course, offset by overallowances on the true value of the customer's used car. Much of the trouble caused by the pack has been the misconception, created in the minds of the public, as to the value of the used car in today's market, as well as the uncertainty of knowing what the new car is worth. The effect has been to confuse the public and to damage the automobile industry. Dealers who would like to do business on a fair, competitive basis have been forced to use such tactics in order to stay in business. Confusion, doubt, and suspicion have developed in the minds of the buying public which have retarded the sale of new cars, and have set off a chain reaction adversely affecting the entire automobile industry, and, in fact, our entire economy."

It is quite obvious that the Automobile Information Disclosure Act was enacted in the effort to remedy a situation peculiar to the automobile industry brought about by widespread fraudulent or deceptive practices principally indulged in by retailers. The Act does indicate that preticketing *per se* is not illegal, but the Commission does not so contend. There is nothing in this Act to indicate that fictitious or deceptive preticketing has Congressional approval.

It follows that the order of the Federal Trade Commission complained of by Petitioners is

Affirmed.

APPENDIX C

DECREE

(Filed and Entered November 7, 1961)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8382

THE BALTIMORE LUGGAGE COMPANY, a Maryland Corporation, and GERTRUDE HOLTZMAN and SAMUEL J. HOLTZMAN, individually and as officers of The Baltimore Luggage Company,

Petitioners,

versus

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION.

This cause came on to be heard on the petition of the above-named petitioners for review of a final order of the said Federal Trade Commission, issued against said petitioners on the 15th day of March, 1961; upon the transcript of record certified and filed in this Court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, this 7th day of November, 1961, that the said order of the Federal Trade Commission be, and the same is hereby, affirmed; and that The Baltimore Luggage Company, a Maryland Corporation, and Gertrude Holtzman and Samuel J. Holtzman, individually and as officers of

The Baltimore Luggage Company, abide by and perform the directions of the Federal Trade Commission in said order contained.

MORRIS A. SOPER,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.